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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

GARY LEHTO,
Petitioner,
vs.
ALLSTATE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the appellate court of California apply a legislative enactment authorizing judgments notwithstanding the verdict (JNOV) for the purpose of overruling a local community's civil jury verdict in favor of a plaintiff, affirmed by the trial court, in light of the historical and constitutional fact that judgments notwithstanding the verdict were not recognized during the common law of 1791 when our Bill of Rights, including the Sixth and Seventh Amendments, was ratified?

2. Given the fact that the United States Supreme Court has already observed in a civil case that trial by jury is a "fundamental guaranty of the rights and liberties of the people," *Slocum v. New York Life Insurance Company*, 228 U.S. 364, 381-382, 385 (1913), and that for similar reasons the Sixth Amendment has been held applicable to the states through the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145 (1968), should the Seventh Amendment be held applicable to the states given its express preservation of the citizenry's 1791 common law right to have the local community examine and determine the facts in controversy without statutory and judicial preemption through judgments notwithstanding the verdict?

3. Alternatively, once the local community's civil jury reaches a verdict in favor of a plaintiff, does the United States Constitution's First, Fifth, Seventh, Eighth, Ninth, Tenth, and Fourteenth Amendments, including the most fundamental rights of liberty emanating from these specific guarantees, prohibit any branch of government from unilaterally overruling the will of the civil jury without allowing that community to re-examine the facts through the common law remedy of ordering a new trial?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

GARY LEHTO,
Petitioner,
vs.
ALLSTATE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Mr. Gary Lehto, respectfully requests and seeks certiorari to review the judgment of the Court of Appeal of California.

I.

OPINION BELOW

The opinion of the Court of Appeal of California, Second Appellate District, is published at 36 Cal.App. 4th 60, 36 Cal.Rptr.2d 814, ___ P.2d ___ (1994), and is reprinted in Appendix A. The order denying the petition for rehearing before the Court of Appeal is reprinted in Appendix B. The opinion and order of the Court of Appeal, modifying its opinion is reprinted in Appendix C. The California Supreme Court's denial of review is

reprinted in Appendix D. Appendices E and F are respectively, the judgment of the Superior Court and that court's denial of the defendant-respondent's motion for new trial.

II.

JURISDICTION

This is an action for damages, based on state statutory and common law. After a verdict in favor of the Petitioner, and denial by the trial court of a motion for judgment notwithstanding the verdict, the Court of Appeal reversed and ordered the trial court to enter judgment notwithstanding the verdict, in violation of the First, Fifth, Seventh, Eighth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution.

The Court of Appeal entered its judgment on December 23, 1994. The California Supreme Court denied Mr. Lehto's Petition for Review on March 16, 1995. This Court has jurisdiction by Title 28, section 1257(a), of the United States Code. 28 U.S.C. § 1257(a).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution:

The First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

The Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be

construed to deny or disparage others retained by the people.

The Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The California Constitution:

Article III, section 1

Sec. 1. The State of California is an inseparable part of the United States of America, and the United

States Constitution is the supreme law of the land.

California Code of Civil Procedure section 629:

> The court, before the expiration of its power to rule on a motion for a new trial, either of its own motion, after five days' notice, or motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.
>
> A motion for judgment notwithstanding the verdict shall be made within the period specified by Section 659 of this code in respect of the filing and serving of notice of intention to move for a new trial. The making of a motion for judgment notwithstanding the verdict shall not extend the time within which a party may file and serve notice of intention to move for a new trial. The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed, and if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same

time. The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for new trial. If a motion for judgment notwithstanding the verdict is not determined before such date, the effect shall be a denial of such motion without further order of the court.

If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict.

Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party. If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the

judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed.

IV.

STATEMENT OF THE CASE

The facts are simple. A Los Angeles civil jury awarded plaintiff/petitioner Gary Lehto compensatory damages in the amount of $3,500,000.00 in an insurance bad faith case against defendant Allstate Insurance Company. (Appendix E.) The trial court denied defendant's motion for judgment notwithstanding the verdict. (Appendix F.) Defendant Allstate Insurance Company appealed, and the California Court of Appeal reversed the trial court by ordering the latter to enter judgment in favor of Allstate Insurance Company notwithstanding the verdict. (Appendix A.)

On Petition for Rehearing Mr. Lehto argued that an order for judgment notwithstanding the verdict violated his rights under the federal Constitution. (Appendix G-3.) The appellate court denied the petition. (Appendix B.) Mr. Lehto petitioned the California Supreme Court for review, again urging that a judgment notwithstanding the verdict would violate his rights under the federal Constitution. (Appendix H-3-4.) That court denied the petition for review. (Appendix D.)

Following this constitutional injury to Mr. Lehto, both the California Court of Appeal and the California Supreme Court rejected Mr. Lehto's due process, civil jury guarantee and equal protection petitions for rehearing on the constitutionality of judgments notwithstanding the verdict, in spite of the fact that such a "monopolistic vehicle of power" did not exist in

common law. Mr. Lehto petitions the United States Supreme Court to overturn the California Appellate Courts for the purpose of reinstating Mr. Lehto's right to collect at least the amount of $3,500,000.00 in compensatory damages against Allstate Insurance Company, as awarded by the community's civil jury and affirmed by the trial court.

These simple facts give rise to profound issues: Do the people still have the power to peacefully and mindfully assemble within a civil jury box to hear and decide peer petitions for redress of grievances, or must the people limit and resign the protection of their freedoms and liberties to the nonpeaceful threat of force under the Second Amendment's right to bear arms? Should the common law principle of respecting the fact-determinative judgment of impartial "general interest" lay jurors be applied with equal force as against the unilateral exercise of JNOV power by the appellate courts? While remaining mindful of the fact that our State and federal Constitutions do not require Justices to be chosen exclusively from the ranks of the "special interest" legal profession, at what point does a lawyer-dominated judiciary begin to lose the respect and following of the people when choosing to exercise JNOV power in opposition to the will of the people?

V.

THE COMMON LAW AND THE CIVIL JURY

The legislatively inventive, judicially followed, and bureaucratically efficient proceeding of "judgments notwithstanding the verdict" (JNOV) symbolically and substantively marks a serious and unconstitutional intrusion into the power of the people to resolve conflicts in the private sector directly through representative civil

jurors! Specifically, JNOVs have been applied "by a jealous judiciary eager to exercise tighter controls over lay participants in the administration of justice." Scheflin, *Jury Nullification: The Right To Say No*, 45 Southern California Law Review 168, 177; Johnston, *Jury Subornation Through Judicial Control*, Vol. 43, No. 4, Law & Contemporary Problems 24 (Autumn 1980).

Nevertheless, Petitioner Gary Lehto's insurance bad faith compensatory damage award of $3,500,000.00 against Allstate Insurance Company was unilaterally and unconstitutionally taken away by the California Court of Appeal through the lone unenforceable vehicle known as a judgment notwithstanding the verdict. *Lehto v. Allstate Insurance Company*, 31 Cal.App.4th 60, 36 Cal.Rptr.2d 814, __P.2d__ (1994). For this reason, Petitioner Lehto requests that the United States Supreme Court overturn the unconstitutional state action of the California Court of Appeal in *Lehto* for the purpose of reinstating the civil jury's verdict and the trial court's entering of judgment on that verdict.

Under both the California and United States Constitutions, the right to any jury trial, civil or criminal, is guaranteed as it existed *at common law at the time the constitutional right was created.* In 1850 and 1791, respectively, judgments notwithstanding the verdict were not recognized in common law, hence JNOVs unconstitutionally invade "the trial by jury [as] a fundamental guaranty of the rights and liberties of the people." *Slocum v. New York Life Insurance Co.*, 228 U.S. 364, 381-382, 385, 33 S.Ct. 523, 57 L.Ed. 879 (1913) . *See also Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-447, 7 L.Ed. 732 (1830); *Dorsey v. Barba*, 38 Cal.2d 350, 355 240 P.2d 604, 606-607 (1952); *People v. Collins*, 17 Cal.3d 687, 692, 131 Cal.Rptr. 782, 785, 552 P.2d 742, 745 (1976), *cert. denied*, 429 U.S. 1077; *Southern Pac.*

Land Co. v. Dickerson , 188 Cal. 113, 204 P. 576 (1922) (citing *Slocum, supra*, when vacating a trial court's order setting aside a civil jury's verdict without the benefit of a new trial, while further observing that once "an issue has been intrusted to a jury, it has . . . become an issue of fact," and remains an issue of fact, never one of law, for purposes of any future "re-examination"); *Gray v. Southern Pac. Co.*, 23 Cal.2d 632, 145 P.2d 561 (1944); California Code of Civil Procedure section 629 (curiously enacted the year following the California Supreme Court's anti-JNOV decision in *Southern Pac. Land Co. v. Dickerson, supra*).

Once a civil jury verdict in favor of a plaintiff was rendered, the common law limited the judicial power's ability to overturn such a verdict to one procedural device: a motion in arrest of judgment, which common law mandated "could *not* be sustained for an insufficiency in the evidence." The common law also mandated that a motion for judgment non obstante veredicto could only be "made by a plaintiff." *Slocum*, 228 U.S. at 381-382. Since these two procedural common law devices were not, and cannot be, applied to *Lehto v. Allstate* — Allstate moved for *JNOV* as a *defendant* allegedly based upon *insufficiency* of evidence — the California appellate courts unconstitutionally overturned the will of the people's civil verdict in *Lehto*. Furthermore, even the common law's "judgment non obstante veredicto" and "motion in arrest of judgment" mandated that "re-examination" of facts decided by the initial jury could only be achieved through granting a *new trial*. *Slocum*, 228 U.S. at 392, 394, 397, 399. In relation, "the rendition of a verdict is of the substance of the right, because to dispense with a verdict is to eliminate the jury, which is no less a part of the tribunal . . . than is the court." 228 U.S. at 397. "*Vacation* of a *favorable*

verdict secured from a jury is a *matter of substance*, and not of mere form . . ." 228 U.S. at 399.

In addition, although not the subject of the *Lehto v. Allstate* trial, the 1791 common law doctrine of jury nullification would be defeated by acknowledging that appellate justices have the tyrannical power to take away a local community's civil verdict and judgment through the un-redressable means of a judgment notwithstanding the verdict, in contradiction to the common law remedies of ordering remittitur or a new trial. The doctrine of jury nullification is the local community's institutional power to resolve conflicts in a peaceful manner that will "guard against the exercise of arbitrary power — to make available the common-sense judgment of the community as a hedge against the . . . overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). More specifically, the historical doctrine of jury nullification allowed juries to decide questions of *law* and fact given their "undisputed power" to reach a verdict contrary to the judge's instructions and the evidence. *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969). This doctrine is consistent with a democratic form of government because, unlike a dictatorship, it allows the people to choose *not* to follow an unjust law. For this reason, our Founding Fathers chose to recognize, rather than eliminate, the doctrine of jury nullification. JNOVs are inconsistent with the concept of the people's jury nullification power. Furthermore, JNOVs eliminate any possibility of the petitioner receiving a new trial on the merits.

In a civil trial conducted under the original jurisdiction of the United States Supreme Court, one of our Founders, Chief Justice John Jay, qualified his instruction that the jury should take the law as given by the court by further stating:

> It must be observed that by the same law, which recognized the reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, *and to determine the law as well as the fact in controversy.*

Georgia v. Brailsford, 3 U.S. (3 Dall) 1, 4, 1 L.Ed. 483 (1794); *see also* Scheflin, *Jury Nullification: The Right To Say No*, 45 Southern California Law Review 168, 175-176.

In further recognition of the jury's nullifying power, another Founder, John Adams, noted in his February 12, 1771 diary:

> that the jury power to nullify the judge's instructions derives from the *general* verdict itself, but if a judge's instructions run counter to fundamental constitutional *principles*, 'is a juror obliged to give his verdict generally, *according to his direction* or even to the fact specially, and *submit the law to the court*? Every man, of any feeling or conscience, will answer, *no*. It is not only his right, but his *duty*, in that case to find the verdict according to his own best understanding, judgment, and *conscience, though in direct opposition to the direction of the court*. . . . [T]he common people . . . should have as complete a control, as decisive a negative, in *every* judgment of a court of judicature' as they have in other decisions of government.

2 Life and Works of John Adams 253-255 (C.F. Adams

ed 1856); Scheflin, *Jury Nullification: The Right To Say No*, 45 Southern California Law Review 168, 174-175.

Clearly, the doctrine of jury nullification itself explains why the Founders would have never tolerated the oppressive control associated with judgments notwithstanding the verdict. When the state ratifying conventions originally proposed a federal Bill of Rights, the civil jury trial guarantee was proposed by more states than any other guarantee, even including religious freedom, free speech, free press, the right to assembly and petition, the right to bear arms, the right against unreasonable searches and seizures, and the right to due process. Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights*, Madison House, expanded ed. (1992), p. 158. In addition, all eight of these state conventions recommended a "reserved powers" guarantee, ultimately reflected in the Tenth Amendment's expression of "or to the people" when delineating the three "spheres" of power. *Id.*

After declaring independence from England, 10 of the 13 colonies immediately adopted constitutional jury trial guarantees while the remaining three adopted this right by statute or by common practice. *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 341, 99 S.Ct. 645, 656, 58 L.Ed.2d 552 (1979) (Rehnquist, J., dissenting).

Therefore, the original intent of the Founders and their common law at that time was to preserve the lay community's right to administer justice in civil and criminal cases directly through its representative jury system, thereby providing an additional check and balance against both private and public sectors. Judgments notwithstanding the verdict represent an oligarchic rejection of this most fundamental democratic and constitutional principle.

Our pro-jury Founders guaranteed a strong civil jury justice system as a mainstream preference to armed

conflict resolution. Nevertheless, the passage of time, well-financed lobbying and short memories have weakened the power and influence of the civil jury. This weakening has occurred without any constitutional amendment! Two hundred years later and reminiscent of old, in the front page Wall Street Journal article entitled "More Angry Men," May 25, 1995, a spokesman for the Fully Informed Jury Association was quoted as making the following disturbing observation:

> They [changes] are going to come either from the jury . . . or they will come by violence and bloodshed.

As stated by Thomas Jefferson, a strong proponent of the civil jury, in his *A Summary View of the Rights of British America* (1774):

> History has informed us, that bodies of men as well as individuals, are susceptible of the spirit of tyranny.
>
> * * *
>
> The great principles of right and wrong are legible to every reader; to pursue them, requires not the aid of many counsellors.

Beloff, The Debate on the American Revolution, 3rd ed., Sheridan House, pp. 163, 175-176.

Pursuant to the above background, Petitioner Gary Lehto specifically addresses below those constitutional rights violated by the State of California's authorization and application of a judgment notwithstanding the verdict.

VI.

SPECIFIC CONSTITUTIONAL VIOLATIONS PRESENTED BY THE EXERCISE OF JNOV POWER

A. SEVENTH AMENDMENT

The Seventh Amendment of the United States Constitution, forbidding reexamination in any court of those facts tried by a civil jury, has been expressly incorporated by the California Constitution, Article III, section 1, as "the supreme law of the Land." Furthermore, trial by civil jury "is a fundamental guaranty of the rights and liberties of the people." *Slocum*, 228 U.S. at 385. Therefore, the Seventh Amendment is also applicable to the states through the due process/liberty clause of the Fourteenth Amendment. Since the Sixth Amendment of the United States Constitution has been held applicable to the states through the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and since our rights to civil and criminal jury verdicts are *equally* protected, due process and equal protection will be violated if the Seventh Amendment of the United States Constitution continues to be held not applicable to the states. A judgment notwithstanding the verdict constitutes a re-examination of facts reached by a civil jury in violation of the Seventh Amendment, particularly given the fact that the California appellate court refused to allow for a second re-examination of the facts by a civil jury through the common law remedy of ordering a new trial.

B. ACCESS TO THE COURTS

By its failure to defer to the civil jury and the trial court, the only adjudicative witnesses to the demeanor and credibility of those Allstate employees who testified, and by its failure to at least, if not affirm, order a new trial for further re-examination of the facts by a second civil jury, the California appellate court unconstitutionally denied Petitioner the benefit of a civil jury's fact determination, and further denied the Petitioner his common law right to have access to a new trial for further re-examination of the facts, in violation of the fundamental right to have access to the courts as announced in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

C. PENUMBRA RIGHTS VIOLATED BY JNOV

Griswold v. Connecticut, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), recognized that specific guarantees in our Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance." By its mere existence, unrecognized in common law, and by its application to Petitioner, the judgment notwithstanding the verdict violated the Petitioner's right under the First Amendment of the United States Constitution to have citizens peacefully assemble as jurors to hear Mr. Lehto's petition for a redress of grievances. In addition, Mr. Lehto's right to have his case judged by his peers within the community, denied by a JNOV, represents one of the privileges and immunities of citizens of the United States under the Fourteenth Amendment of the United States Constitution. Furthermore, under the Eighth, Ninth and Tenth Amendments of the United States

Constitution, the Petitioner has a right, violated by the JNOV, to have peaceful and final conflict resolution without excessive exercise of power by government. Because judgments notwithstanding the verdict were not recognized by the common law in 1791, no court sworn to uphold the United States Constitution is empowered to apply the JNOV. Fact determinations involve power under the Tenth Amendment that is reserved "to the people" alone, as further exemplified by the Seventh and Ninth Amendments of the United States Constitution.

D. EQUAL PROTECTION

The United States Constitution does not discriminate by degree of significance between the civil and criminal forms of jury trial. Both forms are guaranteed equally. If the United States Supreme Court records its refusal to accept hearing of this petition, a logical presumption can be raised that government is empowered to imprison a criminally prosecuted citizen, found innocent by a jury, by merely having an appellate court enter a judgment notwithstanding the verdict. If such a presumption appears obscene under American criminal justice, it should appear equally obscene under American civil justice.

E. PROCEDURAL DUE PROCESS

The doctrine of "procedural due process" guarantees one "the right to be heard before being condemned to suffer grievous loss of any kind." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed 817. (1951) (Frankfurter, J., concurring). The JNOV power exercised by the California appellate courts constitutes governmental action condemning Mr. Lehto to suffer grievous loss of his civil jury verdict and judgment without providing

Mr.Lehto any opportunity to be heard through the common law remedy of a new trial before a new civil jury.

VII.

CONCLUSION

Petitioner Gary Lehto respectfully requests that this Court agree to hear his petition to reverse the judgment of the Court of Appeal and reinstate the civil jury's verdict and the trial court's judgment in his favor and against Allstate Insurance Company in the amount of $3,500,000.00, at least.

Dated: June 13, 1995.

Respectfully Submitted,

MAZURSKY, SCHWARTZ
& ANGELO

CHRISTOPHER E. ANGELO
Counsel of Record

Attorneys for Petitioner
GARY LEHTO

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal -
Second Dist.
FILED
DEC 23 1994
Joseph Lane, Clerk
____ Deputy Clerk

GARY LEHTO,
Plaintiff and Appellant,
v.
ALLSTATE INSURANCE COMPANY,
Defendant and Appellant.

B064243

(Super. Ct. No. C682570)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lillian M. Stevens, Judge. Reversed with directions.

Watkins & Stevens, Steven B. Stevens, Mazursky, Schwartz & Angelo, and Christopher E. Angelo for Plaintiff and Appellant.

Crosby, Heafey, Roach & May, James C. Martin, Kathy M. Banke, and Timothy P. O'Toole for Defendant and Appellant.

In this insurance bad faith suit, defendant Allstate Insurance Company appeals the judgment entered following a jury's verdict in favor of plaintiff Gary Lehto. Prior to the instant action, Allstate's insureds, Israel and Raul Carbajal, entered into a stipulated judgment in the amount of $2.6 million in favor of plaintiff, in exchange for a covenant not to execute and an assignment of the Carbajals' bad faith claims against Allstate. The jury awarded plaintiff $2.5 million in compensatory damages based on the Carbajals' bad faith claims, and $1 million in compensatory damages for plaintiff's bad faith action based on breach of Insurance Code section 790.03, subdivision (h). The trial court granted Allstate a nonsuit with respect to plaintiff's claims for punitive damages, a holding which plaintiff challenges on appeal. Plaintiff also appeals the trial court's post-judgment order denying his request that Allstate pay interest on the stipulated judgment from the date of its entry. Finally, both parties appeal various evidentiary and instructional rulings of the trial court.

FACTS

In May 1980, Raul Carbajal, the teenage son of Allstate's insured, Israel Carbajal, was involved in a head-on collision with another vehicle, in which five people were injured. Plaintiff was the most seriously hurt, suffering permanently disabling injuries. As a result of its preliminary investigation of the accident, Allstate concluded that Raul was at fault, since he had crossed the center line (although it was unclear whether Raul had fallen asleep or was intoxicated).[1] The Carbajals' insurance policy provided limits of $25,000

[1] It was later revealed that Raul's blood alcohol level at the time of the accident was in excess of 0.11.

per person and $50,000 per accident, while plaintiff's medical bills quickly exceeded those limits. The Carbajals had no assets from which to satisfy a judgment other than their Allstate policy.

Shortly after the accident, plaintiff's attorney, Ronald Dean, asked to interview Raul Carbajal. In response to that request, Allstate referred the matter to the law firm of Hiestand & Brandt, who recommended that the Carbajals not give statements to plaintiff's counsel. By July 1980, both Allstate and Hiestand & Brandt had discovered that Raul had a number of moving violations, suggesting that Israel might be separately liable to plaintiff on a negligent entrustment theory.

In July 1980, Allstate filed an interpleader action in order to apportion the policy limits among the five claimants, depositing the $50,000 policy limits with the court. The interpleader, filed on Allstate's behalf by the Hiestand firm, named the five claimants as well as the Carbajals as defendants.

On September 15, 1980, attorney Hiestand reported to Allstate that plaintiff intended to seek $2 million in damages from Israel and Raul. Plaintiff filed suit on October 3, 1980, naming Israel, Raul, Raul's three passengers, the City of Oxnard and the State of California as defendants. Allstate authorized Hiestand to appear on behalf of Israel and Raul in the newly-filed lawsuit.

Throughout 1981, plaintiff consistently maintained that he had no intention of accepting the per claimant policy limits through the interpleader if it would result in the dismissal of the Carbajals from the personal injury action. Plaintiff's attorney, Dean, reiterated this position the following month, saying that he would "not accept the $25,000 in full settlement of all claims . . . as my client's damages easily exceed $2.5 million." Dean went on to insist that plaintiff was entitled to immediate

payment of the policy limits without a release, as "mitigation" and "partial payment" of his damages. In response to Dean's demands, Hiestand stated that Allstate was not required to fund plaintiff's lawsuit against Israel and Raul, and repeatedly told Dean that Allstate would not pay the limits without a release of the Carbajals.

In mid-1981, the five claimants, including plaintiff, reached an agreement regarding apportionment of the policy proceeds, and Allstate filed a motion in the interpleader action to distribute the funds.[2] The interpleader court required the settling claimants to release the Carbajals as a condition of obtaining their share of the policy proceeds. Because plaintiff refused to release the Carbajals, the court ordered that plaintiff's share of the proceeds be held by the court pending resolution of plaintiff's personal injury lawsuit. Throughout this time, Allstate's counsel advised it to refuse plaintiff's demand to pay the policy limits without a release, notwithstanding Dean's continuing accusations of bad faith.

On February 27, 1982, plaintiff made a new settlement proposal: He would release Israel, but not Raul, in exchange for the $25,000 policy limits. Upon learning of this proposal, Hiestand told the Carbajals that it was "illegal." Not surprisingly, based on their counsel's advice, the Carbajals were adamantly opposed to the offer, with Israel refusing to allow his son's interests to be sacrificed so that he could get out of the lawsuit. Hiestand communicated the Carbajals' sentiments to Allstate.

Allstate's counsel, Conway, in turn responded to plaintiff's offer, stating that Allstate owed an equal duty to each of its insureds and that Allstate would not agree

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[2] At Hiestand's urging, Allstate retained new counsel, the firm of Mavradis & Conway, to represent it in the interpleader action.

to a settlement that would leave one of its insureds bereft of coverage and fund the litigation against him. Conway also advised Allstate that if it accepted the offer, Raul would undoubtedly file a bad faith action against the insurer.

In reply to Allstate's rejection of his "Israel only" proposal, Dean noted that the proposed settlement entailed no conceivable detriment to Raul since he would continue to receive a defense and would get a $25,000 credit against any damages awarded in plaintiff's case.

Conway disagreed with Dean's assessment, reasoning that, without a release, plaintiff's tort action would proceed to trial against Raul alone, with the possibility of a large judgment against him. Conway reiterated to Allstate that it could not protect one insured at the expense of the other without incurring liability for bad faith. Due to the impasse, Conway recommended that Allstate file a declaratory relief action, seeking a determination of the parties' respective rights and obligations in the face of plaintiff's "Israel only" offer.

That action was filed in November of 1982.[3] Although plaintiff had in the past argued that he was entitled to immediate and unconditional payment of the policy limits, he demurred on the ground that the declaratory relief action was premature since plaintiff's tort suit against the Carbajals had not yet been resolved. The trial court agreed and dismissed the action without prejudice.

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[3] Allstate delayed filing the declaratory relief action at plaintiff's request. Plaintiff indicated that he would release both of the Carbajals if he was satisfied that Raul's passengers' testimony would support plaintiff's claims against the City of Oxnard and the State. Dean was apparently not so satisfied, since he later notified Conway that he could proceed with the declaratory relief action.

Plaintiff's case against the Carbajals was inactive while plaintiff pursued an appeal against the City of Oxnard, which had successfully demurred to plaintiff's complaint.[4] When activity on the case resumed, and after a pretrial motion to exclude Raul's driving record was denied in March 1987, Hiestand & Brandt advised Allstate that it was discussing settlement of plaintiff's claims against the Carbajals by way of a stipulated judgment with a covenant not to execute and an assignment of the insureds' bad faith claims. On June 29, 1988, the parties entered into such a settlement, which included a $2,635,000 stipulated judgment, as well as a finding that the Carbajals were 95 percent at fault for plaintiff's injuries.

On April 8, 1988, plaintiff filed this bad faith action, seeking $2.5 million in damages on the Carbajals' assigned claim against Allstate, plus additional compensatory and punitive damages based on Allstate's breach of Insurance Code section 790.03, subdivision (h) by, among other things, not attempting in good faith to effectuate prompt, fair, and equitable settlement of plaintiff's claim when liability had become reasonably clear.[5]

The case proceeded to trial in July 1991. Plaintiff argued that Allstate committed multiple acts of bad faith in handling plaintiff's claims against the Carbajals. The jury agreed with plaintiff's assessment, awarding $2.5

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[4] During this time, Allstate agreed to waive the five-year statute.

[5] The Supreme Court created this latter cause of action, for an insurance company's breach of duty to the claimant under its insured's policy, in *Royal Globe Insurance Company v. Superior Court* (1979) 23 Cal.3d 880, and eliminated the action in *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287. However, the latter decision is to be applied prospectively only. The Supreme Court issued its opinion in *Moradi-Shalal* on August 18, 1988, four months after plaintiff filed this lawsuit.

million in damages on the assigned claims of Israel and Raul,[6] and an additional $1 million on plaintiff's "Royal Globe" claim. The trial court had granted a nonsuit in Allstate's favor as to plaintiff's claim for punitive damages; thus no such damages were awarded.

Subsequent to rendition of the verdict, plaintiff submitted a proposed judgment to the court that included $804,357 in interest on the stipulated judgment entered into between plaintiff and the Carbajals. Allstate opposed the proposed judgment and, after a hearing on the matter, the trial court denied plaintiff's request for interest on the stipulated judgment. The trial court also denied Allstate's motions for new trial and for judgment notwithstanding the verdict.

DISCUSSION

Plaintiff, as assignee of the Carbajals' claims against Allstate, sued Allstate for bad faith refusal to settle the personal injury action filed against them by plaintiff. The basis of such a bad faith suit has been explained as follows: " ' "[I]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement" [citation], that this principle is applicable to insurance policies, and that "the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty" [citation]. [¶] More specifically, the insurer must settle within policy limits when there is substantial likelihood of recovery in excess of those limits. [Citations.]' If the insurer breaches the duty to

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[6] However, the jury found that Raul suffered no damages as a result of Allstate's bad faith.

settle, the insurer is liable to the insured for the consequences of the breach." (*Purdy v. Pacific Automobile Ins. Co.* (1984) 157 Cal.App.3d 59, 71, quoting *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 940-941; see also *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659; *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1145, 1459.) The consequence of this breach of the duty of good faith and fair dealing is the insurer's liability for the entire amount of the judgment recovered against the insured, including the amount in excess of the policy limits. (*Comunale v. Traders & General Ins. Co., supra*, 50 Cal.2d at p. 600; *Walbrook Ins. Co. v. Liberty Mutual Ins. Co., supra*, 5 Cal.App.4th at pp. 1453-1454.) Because Allstate's preliminary investigation disclosed that both Israel and Raul Carbajal were exposed to liability in excess of the limits of their insurance policy, Allstate's duty to attempt to settle plaintiff's suit against them within those limits was immediately implicated.

Allstate contends that, as a matter of law, bad faith liability cannot be predicated on any of the following actions which plaintiff cites as instances of Allstate's bad faith: (1) failing to offer plaintiff the $15,000 limits of vicarious owner liability under Vehicle Code section 17151; (2) filing an interpleader action; (3) mishandling a conflict of interest between Israel and Raul; and (4) rejecting plaintiff's "Israel only" proposal because it did not include a complete release of all insureds. We consider each of these contentions in turn.

1. Liability based on the Vehicle Code

Vehicle Code section 17150 provides that an owner of a motor vehicle is liable for the negligent or wrongful acts or omissions of any person using the vehicle with the owner's permission. Vehicle Code section 17151,

subdivision (a) limits the owner's vicarious liability to $15,000 per person and $30,000 per accident. Plaintiff argued to the jury that Allstate's failure to offer $15,000 on behalf of Israel Carbajal in satisfaction of his Vehicle Code section 17150 liability constituted bad faith.

The record does not support a finding of bad faith premised on Israel's vicarious liability under the Vehicle Code. Rather, the evidence established that upon completion of its investigation, Allstate offered to settle with all claimants for the Carbajals' policy limits of $25,000 per person and $50,000 per accident. The fact that, if Raul were found at fault, Israel would be liable to plaintiff for $15,000 under the Vehicle Code, does not increase the policy limits. Upon determining that its insureds' liability, under Vehicle Code section 17150 or otherwise, was reasonably clear, Allstate offered the limits of its policy. This is precisely what an insurer is required to do.

2. Liability based on Allstate's filing of interpleader action

Plaintiff also theorized that Allstate's conduct in filing and prosecuting the interpleader action constituted bad faith, relying on *National Life & Accident Ins. Co. v. Edwards* (1981) 119 Cal.App.3d 326 and *Kelly v. Farmers Ins. Exchange* (1987) 194 Cal.App.3d 1.

In *National Life, supra*, a decedent's aunt and estranged wife both claimed the right to benefits under a life insurance policy. The carrier interpleaded the funds and the claimants cross-claimed for breach of the implied covenant of good faith and fair dealing. The appellate court stated that " '[T]he filing of an interpleader or payment into court by the insurer can be construed only as a recognition of liability to the rightful claimant and as a measure taken to protect the insurer

against a double liability.' (*Pimentel v. Conselho Supremo etc.* (1936) 6 Cal.2d 182, 186.)" (*National Life & Accident Ins. Co. v. Edwards, supra*, 119 Cal.App.3d at p. 340.) It recognized, however, that the filing of an interpleader action will not sanitize a claim that is being prosecuted in bad faith. It concluded: "A bad faith action cannot be predicated upon National filing an interpleader unless there was a showing that the claims of the interpleading parties were not asserted in good faith." (*Ibid.*)

Here, as in *National Life*, multiple claims were asserted against the proceeds of the insureds' policy. The interpleader was thus properly filed to apportion the policy proceeds among the competing claimants. While the filing of the interpleader action would not absolve Allstate of liability had it refused in bad faith to offer the policy limits to the Carbajals' claimants, the filing of the interpleader, standing alone, cannot itself constitute an act of bad faith.

Kelly v. Farmer Ins. Exchange, supra, 194 Cal.App. 3d 1 does not hold otherwise. There, Kelly was injured when he was struck by an automobile owned and operated by an uninsured driver. A passenger in that car was giving driving lessons to the owner/driver. Kelly sustained injuries in excess of $45,000. Kelly received $15,000 in uninsured motorist benefits from United Pacific, his employer's insurer. He then filed a claim against the passenger/instructor and her carrier, Farmers, for the policy limits of $25,000. Farmers offered to settle for policy limits provided that United Pacific release any claim or right of subrogation based on its uninsured motorist payments to Kelly. When United Pacific refused to do so, Kelly demanded that Farmers settle for the policy limits despite United's subrogation claim, an offer Farmers continued to decline. (*Kelly v.*

Farmers Ins. Exchange, supra, 194 Cal.App.3d at pp. 4-5.)

Farmers then filed an interpleader action to resolve the competing claims to the policy. The interpleader concluded with a finding that Kelly would not be fully compensated for his damages by both insurance policies, and that he was therefore entitled to the full amount of the Farmers policy limits. Farmers then offered to settle Kelly's claims against Farmers's insured for the $25,000 policy limits, without conditions, which offer Kelly refused. (*Id.* at p. 5.)

After recovering a $158,000 judgment against Farmers's insured, Kelly sued Farmers for bad faith breach of Insurance Code section 790.03. Summary judgment was entered in favor of Farmers, who maintained that an insurer's obligation of good faith and fair dealing precludes it from paying its policy limits for a settlement that does not dispose of all claims against its insured. (*Ibid.*)

The Court of Appeal reversed. It held that in reality Farmers was faced with only one claimant for the policy limits, since two prior decisions of the Court of Appeal[7] had determined that uninsured motorist carriers in United Pacific's position have no subrogation rights against the insured tortfeasor. Thus, the court reasoned that a triable issue of fact existed as to whether Farmers's refusal to pay the policy limits unless United released its non-existent claim constituted an unfair

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[7] *Security Nat. Ins. Co. v. Hand* (1973) 31 Cal.App.3d 227 and *California State Auto. Assn. Inter-Ins. Bureau v. Huddleston* (1977) 68 Cal.App.3d 1061, hold that the right of subrogation granted to the carrier by the Insurance Code does not grant the uninsured motorist carrier the right to recover the money paid out to its insured for the personal injuries suffered by its injured insured from the insured tortfeasor's company, unless and until its own injured insured is fully compensated for his damages.

settlement practice. (*Id.* at pp. 7-10.)

Kelly provides no support for plaintiff's argument. As noted, the act of bad faith, if indeed the trier of fact determined that Farmers violated its duties,[8] was to refuse to settle plaintiff's bona fide claim for the policy limits in settlement of his lawsuit when in fact there were no other persons with valid claims to the proceeds. This comports with our holding that filing of an interpleader action alone will not subject an insurer to bad faith liability. While such a filing will not insulate the insurer's actions from claims of bad faith, it was Farmers's conduct in refusing Kelly's bona fide claim to the policy proceeds, in the absence of valid, competing claims against the policy, which could subject it to liability. This situation is readily distinguishable from that of Allstate, which faced multiple bona fide claims against the Carbajals' limited policy.

As to plaintiff's claim that Allstate filed the interpleader in order to decrease its defense costs: While a successful interpleader action will inexorably result in reduced defense costs, this does not render resort to the procedure an act of bad faith. In fact, the interpleader action here had the intended result: It awarded plaintiff, the most seriously injured of the claimants, the $25,000 per person limit under the policy. Plaintiff chose to litigate his tort claims against the Carbajals rather than accept the policy limits in settlement of those claims, as was his right. That does not change the fact that Allstate's use of the interpleader action in this case was perfectly proper: It provided a judicially supervised forum for the collective resolution of all competing claims, the very purpose of interpleader. (*Hancock Oil*

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[8] As the Court of Appeal in *Twaite v. Allstate Ins. Co.* (1989) 216 Cal.App.3d 239 observed, the *Kelly* court articulated no standard against which to measure the insurer's conduct. (*Id.* at p. 255.)

Co. v. Hopkins (1944) 24 Cal.2d 497, 508; *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 873-874.)

3. Liability based on Allstate's failure to appoint separate counsel for Israel and Raul and rejection of the "Israel only" offer

Next, plaintiff maintains that Allstate's failure to appoint separate counsel for its insureds constituted bad faith.

Initially we note that, plaintiff's argument to the contrary notwithstanding, there was no conflict of interest between Allstate and its insureds. "[A] conflict of interest arises between insurer and insured when a third party claim is made in excess of the policy limits. In such a situation, it will always be to the insured's advantage to have settlement effected within policy limits; the insurer, in deciding whether to compromise a claim, must consider the insured's best interests as much as its own." (*Barney v. Aetna Casualty & Surety Co.* (1986) 185 Cal.App.3d 966, 976.) Where, as here, the insurer early on decides to offer the policy limits in settlement of its insureds' claims, no conflict of interest arises.

As to the purported conflict of interest between Israel and Raul, Allstate correctly notes that, so long as there existed only a potential conflict of interest between its two insureds, it was not required to retain separate counsel for father and son. (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713.) Thus, from the time of the accident until February 1982, when plaintiff made his "Israel only" offer, the interests of Israel and Raul, while potentially adverse, were not in actual conflict. Moreover, Allstate had committed no bad

faith in refusing to settle the case within the policy limits of both of its insureds, since plaintiff refused to consider any settlement offer which included a release of Israel and Raul. (See, e.g., *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 879 [no evidence that injured party would accept a settlement within policy limits].) However, according to plaintiff, the situation changed dramatically when plaintiff offered to release Israel alone in exchange for the $25,000 policy limits. At that point, Allstate was presented with an opportunity to settle plaintiff's claim against Israel, which potentially far exceeded his insurance coverage, for an amount within the limits of his policy. Thus, Allstate first had the ability to settle on behalf of one of its insured within the policy limits when the "Israel only" offer was made. Plaintiff argues that, at that point in time, Allstate was duty bound to appoint separate counsel for Raul, since an inherent conflict of interest between Israel and Raul was created when plaintiff proposed to release Israel alone in exchange for the remaining policy proceeds.[9]

While plaintiff frames the issue in terms of a purported conflict of interest between the two insureds, we believe the real question before us is whether Allstate's insistence on a release of both of its insureds constituted bad faith. We conclude that, in this case, it did not.

For a year and a half, plaintiff steadfastly refused Allstate's offer to pay him the policy proceeds in return for a release of the Carbajals. The interpleader action, too, resulted in an award to plaintiff of the $25,000

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[9] We do not address the issue of whether Allstate was required to appoint separate counsel for Israel and Raul in this case, since even had it done so, Allstate's conundrum would not have been resolved. For even had Israel received the advice of counsel loyal to him alone and demanded that Allstate accept the "Israel only" offer in return for his dismissal from the case, Allstate could not have accepted that offer without prejudicing Raul, as we discuss below.

policy benefits conditioned on a release of the Carbajals, an award plaintiff rejected. Then, in February 1982, plaintiff proposed a new settlement: The release of Israel alone in return for the policy limits. Allstate continued to insist that it would pay the policy limits to plaintiff only upon the release of both of its insureds. Plaintiff contends that Allstate's insistence on this condition was in bad faith.

An insurer owes the duty of good faith and fair dealing to each of its insureds, and cannot favor the interests of one insured over the other. (*Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1021 [review den.].) Moreover, an insurer can breach its duty to its insureds by disbursing the policy proceeds to the insured's claimant without first obtaining a release of the insureds. (*Ibid.*; see also *State Farm Mutual Auto Ins. Co. v. Crane* (1990) 217 Cal.App.3d 1127, 1136; *Palmer v. Financial Indem. Co.* (1963) 215 Cal.App.2d 419, 431; *Merritt v. Reserve Ins. Co., supra*, 34 Cal.App. 3d at p. 871.) We know of no case permitting an insured, or his assignee or claimant, to sue for bad faith on the basis of the insurer's rejection of a settlement demand because it did not include a complete release of the insured. (Cf. *Strauss v. Farmers Ins. Exchange, supra*, 26 Cal.App.4th at pp. 1021-1022; *State Farm Mutual Auto Ins. Co. v. Crane, supra*, 217 Cal.App.3d 1127, 1135-1136; *Coe v. State Farm Mut. Auto Ins. Co.* (1977) 66 Cal.App.3d 981, 994.) And we decline to create such liability, for by offering the policy limits in exchange for a release, the insurer has done all within its power to effect a settlement. Judge Posner explained the rationale behind this conclusion in *Steele v. Hartford Fire Ins. Co.* (7th Cir. 1986) 788 F.2d 441: "[The insurance company] demonstrated good faith in the ordinary sense of these words by protecting the insured's interests at the expense of [its own] . . . h[anging] around vainly trying

. . . to obtain a release from [plaintiff] . . . . We do not suggest that this was altruism, for we know what would have happened if the company had settled [without a release: the insurer would have been accused of bad faith.] It seems, then, that whatever [the agent] did he would be exposing the [insurer] to a claim of bad faith. It cannot be the law that every excess judgment must be paid by the insurance company, so that in effect liability insurance policies have no limits. Such a strange result would not even help policyholders in the long run; insurance companies would have to charge much higher prices, especially for policies with low limits." (*Id.* at p. 447.)

Plaintiff's contention that he should be able to release one insured in return for the policy limits while maintaining his tort action against the other insured is contrary to sound public policy. First, it would permit the claimant to inject himself into the insurance relationship, and to direct the insurer to favor one insured over the other. Thus, the claimant would determine which insured would receive the full benefits of the insurance policy. Such a result can hardly be said to be within the reasonable expectations of the insured. Secondly, sanctioning this power of the claimant would necessarily introduce the issue of the relative wealth of the insureds into the equation. For implicit in plaintiff's argument that Raul would not be prejudiced by Allstate's acceptance of the "Israel only" offer is the notion that Raul had no assets, and thus would not as a practical matter be harmed by the entry of an adverse judgment.

This latter point is particularly troublesome. First, we cannot blithely dismiss, as plaintiff's argument does, the emotional toll that a personal injury trial exacts upon the parties. It is simply not true to state that Israel would not have received greater benefits under the insurance contract, and that Raul would have received all he was

entitled to pursuant to the policy, had Allstate accepted the "Israel only" offer, since Raul would thereby necessarily lose all prospects for settlement and be forced to proceed to trial.[10] More importantly, plaintiff's argument suggests that the relative wealth of multiple insureds should be taken into account by the insurer when considering offers of settlement, and that only a "judgment proof" insured may be forced to remain in a lawsuit if the claimant demands the policy limits for a release of the other insured. The law does not condone such discrimination. (See *Strauss v. Farmers Ins. Exchange, supra*, 26 Cal.App.4th 1017, 1021; *Heredia v. Farmers Ins. Exchange* (1991) 228 Cal.App.3d 1345, 1357; *Coe v. State Farm Mut. Auto Ins. Co., supra*, 66 Cal.App.3d at p. 994.)

Finally, an insured's obligation to satisfy claims under third party liability insurance is premised on the legal liability of the insured.[11] That liability does not arise at the time the injuries are sustained. Rather, the

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[10] Plaintiff cites *Nationwide Ins. Co. v. Hunley* (9th Cir. 1990) 915 F.2d 557 in support of his assertion that Raul would have received all of the benefits of the insurance contract had Allstate accepted the "Israel only" offer. Plaintiff's reliance on that case is misplaced. In *Hunley*, the Circuit Court of Appeal was required to determine whether California Insurance Code section 11580.1, subdivision (b)(4), which requires that car insurance policies insure permissive users "to the same extent that insurance is provided to the named insured," had been satisfied in the particular circumstances of that case. The court held that, where the named insured is released in return for the policy proceeds, the insurer must continue to defend the permissive user, but need not separately indemnify him up to the policy limits for any subsequent judgment, in order to comply with provisions of the Insurance Code. The court was not called upon to decide whether the insurer's conduct in effecting the settlement of the claim against the named insured was in bad faith.

[11] The Carbajals' insurance policy provided that "Allstate will pay for all damages a person insured is legally obligated to pay . . . ."

insured's legal obligation to pay the injured party is created either voluntarily, by agreement of the parties, or involuntarily, by entry of judgment. That is to say, "an insurer is authorized to settle lawsuits, not to pay unilaterally the policy limits to a plaintiff. Moreover, it is generally recognized that such an unconditional payment, which has the effect of bankrolling a plaintiff's case against the insured, is not made in good faith. [Citations.]" (*State Farm Mut. Auto Ins. Co. v. Crane, supra*, 217 Cal.App.3d at p. 1136.)

As the Court of Appeal held in *Coe v. State Farm Mutual Automobile Insurance Co., supra*, "[A]cceptance by [the insurer] of the 'offer,' as made, would have amounted to an abdication of its responsibilities to its own insured. Specifically, it would have breached its 'implied covenant of good faith and fair dealing' not to 'injure [the insured's] rights under [the] policy [citation], and its obligation 'to consider the interests of the assured equally with its own.' [Citation.] Bad faith refusal to accept a settlement offer cannot occur where 'acceptance' would itself be bad faith." (*Id.* at p. 994.) "As [the insurer] would have acted in bad faith by accepting the offer, it could not be held in bad faith for refusing it." (*Strauss v. Farmers Ins. Exchange, supra*, 26 Cal.App.4th at p. 1022.)[12]

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[12] Plaintiff suggests that the holding of *Strauss v. Farmers Ins. Exchange, supra*, decided by the Sixth District Court of Appeal, is in doubt due to a subsequent case, also decided by the Sixth District, *Hartford Casualty Ins. Co. v. Mid-Century Ins. Co.* (1994) 26 Cal.App.4th 1783. We disagree. *Hartford* involved an excess insurer's equitable indemnity action, in which it sought indemnity against the primary insurer for settlement and defense costs incurred in the underlying personal injury action. The primary insurer, Mid-Century, had settled the injured party's claim against the owner/named insured for $15,000, the limits of the owner's liability under Vehicle Code section 17151, subdivision (a), and the limits of the insurance policy. Mid-Century thereafter refused to defend or

(continued)

Such is the case here. Were Allstate to accept plaintiff's "Israel only" offer, it would have left one of its insureds bereft of coverage, an act of bad faith. (*Strauss v. Farmers Ins. Exchange, supra*, 26 Cal.App.4th at pp. 1021-1022; see also *Palmer v. Financial Indem. Co., supra*, 215 Cal.App.2d at p. 431; *Heredia v. Farmers Ins. Exchange, supra*, 228 Cal.App.3d at p. 1355; *Coe v. State Farm Mut. Auto. Ins. Co., supra*, 66 Cal.App.3d at p. 994.) Allstate's failure to do so cannot itself be deemed to be bad faith.

We concur with the *Strauss* court's apt description of the insurer's position as a "Catch-22." "If we were to agree with [plaintiff's] reasoning, an insurer would be liable for either agreeing to or refusing to settle. This dilemma would discourage settlements and defy the reasonable expectations of the insureds." (*Strauss v. Farmers Ins. Exchange, supra*, 26 Cal.App.4th at p. 1022.) Indeed, we think it likely that few plaintiffs would settle a tort action in which two insureds were entitled to benefits under the same insurance policy, since the plaintiffs could receive the policy limits in

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(fn. continued)
indemnify the permissive user, relying on the policy language which provided that the insurer would not defend any suit or make additional payments after it had paid the "limit of liability for the coverage," and that it would pay no more than the maximum limits provided by the policy regardless of the number of insured persons involved in the accident. Interpreting the language of the insurance policy, the Court of Appeal held that Mid-Century had fulfilled its duty by defending and settling for $15,000 on behalf of its own named insurer, and that the obligation of further defense and indemnity properly fell on the excess insurer.

Hartford is inapposite since it did not involve claims of bad faith. Moreover, Mid-Century's settlement on behalf of the owner obviously did not leave its other insured, the permissive user, bereft of coverage. Additional coverage was provided by the excess policy with Hartford.

exchange for the release of one insured, but continue the litigation against the other. This result is completely counter to California's strong public policy in favor of settlement. (*Neary v. Regents of University of Calif.* (1992) 3 Cal.4th 273, 277; *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1382.)

4. Liability based on stipulated judgment

Finally, plaintiff argues that the jury's verdict may be premised on Allstate's conduct in stipulating to entry of a judgment against its insured without their consent. This argument lacks merit.

Plaintiff provides no citations to the record to support his contention that this theory of recovery was pleaded and proved at trial. Moreover, the record contains two documents, one entitled "Assignment of Action" and the other entitled "Stipulation for Entry of Judgment," both of which are apparently signed by the Carbajals and both of which contemplate entry of a stipulated judgment. Lastly, the stipulated judgment itself was signed by the Carbajals' attorney. If that attorney was not authorized to enter into the stipulated judgment, the Carbajals' remedy lies against the attorney who committed the unauthorized act, and not with Allstate, who at most agreed to be bound by the stipulated judgment.

Based on the foregoing, we can discern no basis for the jury's award of damages premised on Allstate's conduct in stipulating to entry of a judgment without the Carbajals' consent.[13]

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[13] Because we agree with Allstate's contention that its conduct in this case did not amount to bad faith, we do not address the additional assignments of error which Allstate briefed on appeal.

DISPOSITION

Because Allstate's conduct in handling plaintiff's claim on behalf of its insured did not constitute bad faith as a matter of law, the trial court erred in denying Allstate's motion for judgment notwithstanding the verdict. Accordingly, the judgment is reversed, and the trial court is directed to enter judgment for Allstate.[14] The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

ARMSTRONG, J.

We concur:

GRIGNON, Acting P.J.

GODOY PEREZ, J.

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[14] Plaintiff also appealed the judgment, citing as error the trial court's grant of nonsuit to Allstate on the issue of punitive damages, as well as the court's ruling denying plaintiff an award of interest on the stipulated judgment. Because we reverse the judgment, plaintiff's appeal is moot.

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Steven B. Stevens
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Suite 600
Los Angeles, CA. 90024

RE: Lehto, Gary
vs.
Allstate Insurance Company
2 Civil B064243
Los Angeles, NO. C682570

THE COURT:
Petition for rehearing denied.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

COURT OF APPEAL
SECOND DIST.
FILED
JAN 13 1995
Joseph Lane, Clerk
Z. Heraldez, Deputy Clerk

GARY LEHTO,
Plaintiff and Appellant,
v.
ALLSTATE INSURANCE COMPANY,
Defendant and Appellant.

B064243
(Super. Ct. No. C682570)
ORDER MODIFYING OPINION
[No Change in Judgment]

THE COURT:*

The first sentence of footnote 12 on page 23 shall be deleted and the following inserted in its place:

> Plaintiff suggests that the holding of *Strauss v. Farmers Inc. Exchange, supra*, is in doubt due to the recent decision of the Court of Appeal in *Hartford Casualty Ins. Co. v. Mid-Century Ins. Co.* (1994) 26 Cal.App. 4th 1783.

There is no change in the judgment.

---

* ARMSTRONG, J. GRIGNON, Acting P.J. GODOY PEREZ, J.

SECOND APPELLATE DISTRICT
DIVISION FIVE, No. B064243
S044706

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
MAR 16 1995
Robert Wandruff Clerk
_____ Deputy

GARY LEHTO, Appellant

v.

ALLSTATE INSURANCE COMPANY, Appellant

Appellant's petition for review DENIED.

ARABIAN
Acting Chief Justice

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

FILED
SEP 09 1991
James H. Dempsey, Clerk
/s/ R. Hernandez, Deputy

GARY LEHTO
Plaintiff(s)
vs.
ALLSTATE INSURANCE COMPANY, et al.,
Defendant(s)

Case Number C 682 570

JUDGMENT ON VERDICT IN OPEN COURT

This action came on regularly for trial on July 31, 1991, in Department 23 of the Superior Court, the Honorable LILLIAN M. STEVENS Judge Presiding; the plaintiff appearing by attorney(s) MAZURSKY, SCHWARTZ & ANGELO by: Christopher E. Angelo and the defendants(s) appearing by attorneys(s) ERVIN, COHEN & JESSUP by: Gregory M. MacGregor and Deborah A. Berthel

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the

special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

TITLE OF COURT AND CAUSE

"WE, THE JURY FIND IN FAVOR OF PLAINTIFF GARY LEHTO AND AGAINST DEFENDANT ALLSTATE INSURANCE COMPANY AND AWARD DAMAGES IN THE AMOUNT OF $ 3.5 MILLION."

Dated: 9-9-91 /a/Mariana Ponce, Foreperson of the jury

SPECIAL FINDINGS WITH GENERAL VERDICT

Question No. 1:

Did the defendant, Allstate Insurance Company, breach or fail to comply with its implied covenant of good faith and fair dealing to Israel Carbajal:

Answer: (X) YES OR ( ) NO

Quesion No. 2:

If so, did Israel Carbajal suffer any damages, injury, loss, or harm as a legal result of Allstate's breach of its implied covenant of good faith and fair dealing to Israel?

Answer: (X) YES OR ( ) NO

Queston No. 3:

Did the defendant, Allstate Insurance Company, breach or fail to comply with its implied covenant of good faith and fair dealing to Raul Carbajal?

Answer: (X) YES OR ( ) NO

Question No. 4:

If so, did Raul Carbajal suffer any damages, injury, loss, or harm as a legal result of Allstate's breach of its implied covenant of good faith and fair dealing to Raul?

Answer: ( ) YES OR (X) NO

Question No. 5:

Did the defendant, Allstate Insurance Company, breach its statutory duty to Gary Lehto to attempt in good faith to effectuate a prompt, fair and equitable settlement of his claim once liability became reasonably clear?

Answer: (X) YES OR ( ) NO

Question No. 6:

If so, did Gary Lehto suffer any damage, injury, loss, or harm as a result?

Answer: (X) YES OR ( ) NO

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said Plaintiff, GARY LEHTO, have and recover from said Defendant, ALLSTATE INSURANCE COMPANY, the sum of $ 3.5 MILLION with interest at the rate of ten per cent per annum from the date of the verdict until paid together with costs and disbursements amounting to the sum of $_____:

DATED _____

_____
Judge of the Superior Court

Date December 11, 1991 Dept. 23

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Honorable LILLIAN M. STEVENS Judge
F. JONES Court Attendant
R. HERNANDEZ, Deputy Clerk
NONE, Reporter

C 682 570 (Parties and Counsel checked if present)

GARY LEHTO
vs
ALLSTATE INSURANCE COMPANY,
et al.,

Counsel for Plaintiff: Mazursky, Schwartz & Angelo
By: C. N. Carreon

Counsel for Defendant: Ervin, Cohen & Jessup
By: G. MacGregor and D. Berthel

NATURE OF PROCEEDINGS: POST TRIAL MOTIONS

In this cause, heretofore submitted on December 09, 1991, the Court rules as follows:

Plaintiff's Motion to Augment the Judgment pursuant to Code of Civil Procedure 685.010 is denied.

Defendant's Motion for Judgment Notwithstanding the Verdicts and Motion for New Trial are denied.

Plaintiff's Memorandum of Costs is granted.

A copy of this minute order is sent Via U. S. Mail this date to counsel for all parties:

Gregory M. MacGregor
ERVIN, COHEN & JESSUP
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Christopher E. Angelo, Esq.
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Los Angeles, CA 90067

Dept. 23

MINUTES ENTERED
12/11/91
COUNTY CLERK

MINUTE ORDER

Court of Appeal no. 2 Civ. B 064243
L.A. Sup. Ct. no. C 682570

Clerk's Office
Court of Appeal - Second Dist.
RECEIVED
JAN -9 1995
Joseph A. Lane, Clerk

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND APPELLATE DISTRICT

GARY LEHTO,
Plaintiff and Respondent and Cross-Appellant,
versus
ALLSTATE INSURANCE COMPANY, et al.,
Defendant and Appellant and Cross-Respondent.

Appeal from the Judgment of the Superior Court
County of Los Angeles
The Honorable Lillian M. Stevens

PETITION FOR REHEARING

Steven B. Stevens,
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Attorneys for Plaintiff, Respondent,
Cross-Appellant and Appellant
Gary Lehto

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V. CONCLUSION 4

* * *

[Text Page 3.]

III.

AN ORDER FOR ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT IS UNCONSTITUTIONAL

An order for judgment notwithstanding the verdict is a denial of the right to jury trial guaranteed by the California Constitution, Article I, section 16, and by the Constitution of the United States, Amendment 7. *Parsons v. Bedford,*, 28 U.S. (3 Pet.) 433, 446-447, 7 L.Ed. 732 (1830) (right to jury trial guaranteed as it existed at common law at the time constitution created); *Dorsey v. Barba*, 38 Cal.2d 350, 355, 240 P.2d 604, 607 (1952); *People v. Collins*, 17 Cal.3d 687, 692, 131 Cal.Rptr. 782, 785, *cert. denied*, *Collins v. California*, 429 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796 (1976). Directed verdict, upon which an order for entry of judgment notwithstanding the verdict must be based, *C.C.P.* § 629, was unrecognized at common law. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913). Additionally, the California Constitution, Article III, section 1, declares the federal constitution to be the supreme law, thus incorporating the latter's Seventh Amendment rights into Article I, section 16 of the California Constitution. An order for judgment notwithstanding the verdict of the jury also violates the due process and equal protection provisions of the federal and California Constitutions, and violates the privileges and immunities clause of the federal constitution.

Supreme Court no. S044706
Court of Appeal no. 2 Civ. B 064243
L.A. Sup. Ct. no. C 682570

SUPREME COURT
FILED
FEB -2 1995
Robert Wandruff Clerk
_____ Deputy

THE SUPREME COURT OF THE STATE OF CALIFORNIA

GARY LEHTO,
Plaintiff and Petitioner,
versus
ALLSTATE INSURANCE COMPANY, et al.,
Defendant and Respondent

Appeal from the Judgment of the Court of Appeal
Second Appellate District

PETITION FOR REVIEW

Steven B. Stevens,
State Bar number 106907
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Attorneys for Petitioner, Mr. Gary Lehto

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Issue Four

(Constitutionality of Judgment Notwithstanding the Verdict)

An order for judgment notwithstanding the verdict is a denial of the right to jury trial guaranteed by the California Constitution, Article I, section 16, and by the Constitution of the United States, Amendment 7. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-447, 7 L.Ed. 732 (1830) (right to jury trial guaranteed as it existed at common law at the time constitution created); *Dorsey v. Barba*, 38 Cal.2d 350, 355, 240 P.2d 604, 607 (1952) (right to jury trial as it existed in 1849, at the time California Constitution adopted); *People v. Collins*, 17 Cal.3d 687, 692, 131 Cal.Rptr. 782, 785, *cert. denied*, *Collins v. California*, 429 U.S. 1077, 97 S.Ct. 820, 50 L.Ed.2d 796 (1976).

Directed verdict, upon which an order for entry of judgment notwithstanding the verdict must be based, C.C.P. § 629, was unrecognized at common law. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913). If a directed verdict was unrecognized at common law when this State embodied the right to jury trial in its constitution, then it cannot now be used to deprive a party of a jury's verdict.

Additionally, a judgment notwithstanding the verdict impairs the litigant's Seventh Amendment right to a jury trial under the federal constitution. While the United States Supreme Court has not held that this amendment is made applicable to the states by virtue of the Fourteenth Amendment, the petitioner believes that this issue should be re-examined. The right to jury trial in state criminal cases is well-recognized. The right to jury trial in civil cases has never been accorded "second-class"

status. *Small v. Transcontinental & Western Air, Inc.*, 96 Cal.App.2d 408, 410, 216 Cal.Rptr. 36, 37 (1950) ("trial by jury is a proper case is the right of every citizen, guaranteed by the Constitution of the United States and by the Constitution of California"). That right in a civil case is a necessary incident of liberty in a civil society. A directed verdict or judgment notwithstanding the verdict necessarily impairs that right.

Supreme Court, U.S.
FILED
JUL 14 1995
CLERK

No. 94-2059

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

GARY LEHTO,
Petitioner,
v.
ALLSTATE INSURANCE COMPANY,
Respondent.

Petition For Writ Of Certiorari
To The California Court of Appeal,
For The Second Appellate District, Division Five

RESPONDENT'S BRIEF IN OPPOSITION

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KATHY M. BANKE
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Allstate Insurance Company

* *Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 343 Sansome St. • S.F., CA 94104 • (415) 362-2300

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

Does a state court of appeal violate the federal constitutional right to "jury trial" when it reverses an order denying a motion for judgment notwithstanding the verdict and directs that judgment notwithstanding the verdict be entered on the ground the plaintiff failed to prove a state law claim as a matter of law?

RULE 29.1 STATEMENT

In accordance with Supreme Court Rule 29.1, Allstate Insurance Company hereby states that it has no parent company and no subsidiaries.

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No. 94-2059

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

GARY LEHTO,
Petitioner,
v.
ALLSTATE INSURANCE COMPANY,
Respondent.

Petition For Writ Of Certiorari
To The California Court of Appeal,
For The Second Appellate District, Division Five

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This California state court action, involving only state law insurance "bad faith" claims, arose out of an automobile accident involving petitioner and the son of one of Allstate's insureds. (Pet. App. A2) Allstate quickly concluded that its insured driver was at fault and tendered its $50,000 policy limits ($25,000 limit per claimant). Because multiple claimants with varying injuries were involved, Allstate filed an interpleader action and deposited the policy limits in state court. (*Id.* at A2-A3) The claimants subsequently reached an agreement as to an equitable distribution of the insurance proceeds, and Allstate accordingly settled with and obtained releases from all the claimants, except petitioner. (*Id.* at A4)

Instead, petitioner demanded that Allstate immediately and unconditionally pay him the per claimant limits without any settlement and release of either of its two insureds (the driver/son and owner/father). (*Id.* at A4) When Allstate refused this demand, petitioner twice asked the state interpleader court to release the insurance proceeds to him. (*Id.* at A3-A4) The state interpleader court refused, explaining to petitioner that under California law he had two choices. He could agree to settle and immediately obtain the per claimant policy limits, or he could refuse to settle and pursue a lawsuit against the insureds, in which case he would obtain the limits if and when he recovered a judgment against the insureds. (*Id.* at A4)

Almost two years after the accident, petitioner made a new demand. He would settle with only one of the insureds, the owner/father, in exchange for payment of the policy limits. (*Id.* at A4) Allstate's insureds opposed this demand, and Allstate rejected it because under California law it could not act to the detriment of one insured, nor could it favor one insured over the other. (*Id.* at A4-A5)

Petitioner then proceeded with his personal injury action against the insureds. On the eve of trial, he settled for a $2.6 million stipulated judgment and an assignment of any "bad faith" rights of the insureds, in exchange for a covenant not to execute. (*Id.* at A6) Petitioner then sued Allstate, claiming it had violated California insurance "bad faith" law by refusing to attempt to settle within policy limits. (*Id.*)

The "bad faith" case proceeded to trial, and the jury returned a $3.5 million verdict. (*Id.* at A6-A7) Allstate moved for judgment notwithstanding the verdict (JNOV) on the ground the evidence did not and could not support a claim of "bad faith" as a matter of law. (*Id.* at A7) When this motion was denied, Allstate appealed to the California Court of Appeal. In an extensive opinion, the Court of

Appeal concluded that under California's insurance "bad faith" law, petitioner had failed to prove any claim of "bad faith" as a matter of law. It therefore ruled that the trial court had erred in denying Allstate's motion for JNOV, and in accordance with California procedural law, directed that the trial court enter JNOV in Allstate's favor on remand. (*Id.* at A21)

Petitioner then filed a petition asking for rehearing by the California Court of Appeal, which was denied. (Pet.App. B1) Petitioner then filed a petition for review by the California Supreme Court. This petition was also denied. (Pet.App. D1)

THIS PETITION IS FRIVOLOUS AND SHOULD BE DENIED BECAUSE THERE IS NO FEDERAL ISSUE PRESENTED BY THIS STATE LAW TORT CASE

Supreme Court Rule 10 specifies that review on writ of certiorari is not a matter of right and that a petition will be granted only when there are special and important reasons to do so. S.Ct.R. 10.1. Rule 10 further states that such reasons include where there is a conflict on a federal question in the United States court of appeals, where there is a conflict on a federal question between a state court of last resort and an United States court of appeals, and where a state court or United States court of appeals has decided an important question of federal law that should be decided by this Court. *Id.*

The crux of petitioner's purported constitutional claims here is that the California Court of Appeal violated his "right to jury trial" when it ruled that the evidence he presented at trial failed to establish an insurance "bad faith" claim under California law and that the trial court erred in denying Allstate's motion for JNOV. In short, petitioner claims a jury's verdict is sacrosanct and that appellate courts

are constitutionally prohibited from overturning a jury's verdict even when that verdict is based on erroneous and improper legal rulings and is unsustainable under the controlling substantive law. This claim is specious and does not conceivably meet the standard set forth in Rule 10.1 for review on writ of certiorari.

Indeed, there is no substantive difference between the California JNOV statutes [Cal. Civ. Proc. Code § 629 (*see* App. A)] and its federal counterpart in Fed.R.Civ.P. Rule 50(b). In fact, petitioner makes no attack on the standards set forth in the California statute or any alleged failure by the Court of Appeal to correctly apply them. Rather, he makes the now antiquated claim that *any* use of JNOV violates his federal right to jury trial because such a procedural device did not exist in the common law. Yet, the federal courts have not doubted the constitutionality of JNOVs since the enactment of Fed.R.Civ.P. 50(b) in 1937. *See, e.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Berry v. United States*, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945 (1941); *Nelson v. Production Credit Ass'n of the Midlands*, 930 F.2d 599, 604, fn. 6 (8th Cir.), *cert. denied*, 112 S.Ct. 417, 116 L.Ed.2d 438 (1991) ("The Supreme Court has long held that the question of whether there is sufficient evidence to support submission of an issue to the jury is a legal determination, and that entry of judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b) does not contravene the Seventh Amendment.")

In fact, the federal courts routinely overturn jury verdicts and, as did the California Court of Appeal, direct entry of judgment as a matter of law on claims which are unsupported by sufficient legal evidence. *E.g., McCann v. Litton Sys., Inc.*, 986 F.2d 946 (5th Cir. 1993); *Romero v. Int'l Harvester Co.*, 979 F.2d 1444 (10th Cir. 1992); *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441 (11th Cir. 1991);

Newton v. Nat'l Broadcasting Co., 930 F.2d 662 (9th Cir.), *cert. denied*, 112 S.Ct. 192, 116 L.Ed.2d 152 (1991).

Plaintiff's reliance on *Slocum v. New York Life Insurance Company*, 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913), is wholly misplaced. *Slocum* concerned the application of a state JNOV statute in federal district court. Moreover, the Court later upheld the constitutionality of state JNOV practices in similar contexts. *Northern Railway v. Page*, 274 U.S. 65, 47 S.Ct. 491, 74 L.Ed. 929 (1927); *Baltimore & Carolina v. Redman*, 295 U.S. 654, 55 S.Ct. 890, 71 L.Ed. 929 (1935).[1]

Indeed, if petitioner's theory were correct — that where there has been a jury demand, a jury must decide the case and its decision is immutable and irreversible — then *all* judgments as a matter of law, which include summary judgments, nonsuits, and directed verdicts, as well as JNOVs, are unconstitutional. This, of course, is not the case. *E.g., Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1569 fn. 2 (9th Cir. 1992).

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[1] Furthermore, the Seventh Amendment right to jury trial, which is the principal constitutional provision petitioner seeks to invoke, addresses the exercise of federal judicial power in common law actions. The amendment therefore applies only to federal courts, and the state courts are not bound by it. *Minneapolis & St. v. L.R.R. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 60 L.Ed. 961, 963 (1915); *Pearson v. Yewdall*, 95 U.S. 294, 296, 5 Otto 289, 24 L.Ed. 436, 437 (1877); *Walker v. Sauvinet*, 92 U.S. 90, 92, 2 Otto 90, 23 L.Ed. 678, 679 (1875); *Matter of Jacobs*, 44 F.3d 84, 89 (2d Cir. 1994).

CONCLUSION

Petitioner's potpourri of arguments boil down to one claim: that JNOVs violate the Seventh Amendment right to a civil jury trial. The federal courts long ago rejected this claim, and the California Court of Appeal's use of JNOV is in harmony with the federal practice. Therefore, this case presents no question of federal law, and the petition should be denied.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

EZRA HENDON
Attorneys for Respondent
Allstate Insurance Company

APPENDIX A

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 629. Judgment Notwithstanding The Verdict

The court, before the expiration of its power to rule on a motion for a new trial, either of its own motion after five days' notice, or on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.

A motion for judgment notwithstanding the verdict shall be made within the period specified by Section 659 of this code in respect of the filing and serving of notice of intention to move for a new trial. The making of a motion for judgment notwithstanding the verdict shall not extend the time within which a party may file and serve notice of intention to move for a new trial. The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed, and if a motion for a new trial has been filed with the court by the aggrieved party, the court shall rule upon both motions at the same time. The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before such date, the effect shall be a denial of such motion without further order of the court.

If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order

denying the motion for judgment notwithstanding the verdict.

Where a new trial is granted to the party moving for judgment notwithstanding the verdict, and the motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict shall nevertheless be reviewable on appeal from said order by the aggrieved party. If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed.